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IN THE
COURT OF APPEALS OF INDIANA

THOMAS PLUMP,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 71A05-0603-PC-127
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable David C. Chapleau, Judge
Cause No. 71D06-9406-CF-566

September 18, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Judge

Appellant-petitioner Thomas Plump challenges the denial of his petition for post-conviction relief. Specifically, Plump contends that the findings of the post-conviction court are erroneous because he established that his trial counsel was ineffective. Finding no error, we affirm the judgment of the post-conviction court.

FACTS

The facts of this case, as found by this court on direct appeal, are:

> [O]n June 8, 1994, Plump, Otha Halbert, Steven Rios, and two others drove to the house of Vincent Bowens. Halbert wanted to visit Bowens because Bowens allegedly owed him money. Plump, Halbert and Rios went to the door of Bowens' house. Halbert demanded money from Bowens. Plump was carrying a .12 gauge, sawed-off shotgun and the two others were also carrying guns. Plump and the two other men showed Bowens the guns they were carrying. When Bowens did not comply with the demand, Plump shot him in the stomach. Bowens subsequently died as a result of the gunshot wound.

Plump v. State, No. 71A03-9511-CR-371, slip op. at 2 (Ind. Ct. App. Aug. 20, 1996).

On June 10, 1994, the State charged Plump with conspiracy to commit robbery, attempted robbery, and murder. The supporting probable cause affidavit stated that Halbert, Rios, and other witnesses told the investigating officer that Plump was present during the robbery and had shot Bowens. On October 19, 1994, the State filed a motion to add a charge of felony murder. On January 12, 1995, Plump pleaded guilty to the felony murder charge and the trial court set the sentencing date. On February 6, 1995, Plump moved to withdraw his guilty plea, and the court granted that motion. On April 27, 1995, a jury found Plump guilty of attempted robbery and murder, the trial court merged those offenses, and Plump was sentenced to an aggregate term of imprisonment of forty years.

On January 5, 1996, Plump filed a direct appeal with this court, arguing that there was insufficient evidence to support his conviction and that the trial court abused its discretion by admitting an improperly seized shotgun into evidence. We affirmed Plump's conviction in all respects. Plump, slip op. at 6.

On October 16, 1998, Plump filed a pro se petition for post-conviction relief. On November 13, 1998, a public defender was appointed, and after a counsel substitution and multiple continuances, an amended post-conviction petition was filed on June 21, 2004. Plump argued that he was entitled to relief because his trial counsel was ineffective for failing to object to the addition of the felony murder charge, which Plump claims was added based on statements from his failed plea agreement negotiations with the State. Following an evidentiary hearing on November 15, 2005, the post-conviction court denied Plump's request for relief. He now appeals.

DISCUSSION AND DECISION

I. Standard of Review

Before addressing the merits of Plump's contentions, we initially observe that the petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); McCarty v. State, 802 N.E.2d 959, 962 (Ind. Ct. App. 2004), trans. denied. When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. McCarty, 802 N.E.2d at 962. Post-conviction procedures do not afford petitioners the chance for a "super appeal." Richardson v. State, 800 N.E.2d 639, 643 (Ind. Ct. App.

2003). Rather, post-conviction procedures create a narrow remedy for subsequent collateral challenges to convictions based upon grounds enumerated in the post-conviction rules. Id.; see also Ind. Post-Conviction Rule 1(1). We will disturb the post-conviction court's decision only if the evidence is without conflict, the evidence leads to one conclusion, and the post-conviction court has reached the opposite conclusion. Emerson v. State, 695 N.E.2d 912, 915 (Ind. 1998).

II. Plump's Claim

Plump argues that his trial counsel was ineffective because he failed to challenge the addition of the felony murder charge, which Plump says was filed after the State relied on incriminating statements he made during plea agreement negotiations. Specifically, Plump contends that there would have been a reasonable probability that if his trial counsel had objected to the addition of the felony murder charge the trial court would have dismissed the charge and Plump would not have been found guilty of felony murder.

We apply the two-part test articulated in Strickland v. Washington when evaluating a claim of ineffective assistance of counsel. 466 U.S. 668 (1984); Pinkins v. State, 799 N.E.2d 1079, 1093 (Ind. Ct. App. 2003). First, the defendant must show that counsel's performance was deficient. Strickland, 446 U.S. at 687. This requires a showing that counsel's representation fell below an objective standard of reasonableness and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed to the defendant by the Sixth and Fourteenth Amendments to the United States Constitution. Id. at 687-88. Second, the defendant must show that the deficient performance resulted in prejudice. Id. at 687. To

establish prejudice, a defendant must show that there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different. Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. Finally, if a claim of ineffective assistance can be disposed of by analyzing the prejudice prong alone, we will do so. Wentz v. State, 766 N.E.2d 351, 360 (Ind. 2002).

Withdrawn guilty pleas and statements made during plea negotiations cannot be used against a defendant in a subsequent prosecution for the crime. Kercheval v. United States, 274 U.S. 220 (1927); Moulder v. State, 154 Ind. App. 248, 257, 289 N.E.2d 522, 528 (Ind. Ct. App. 1972). Indiana Code sections 35-35-3-4 and -1-4 prohibit a plea agreement, or any verbal or written communication concerning a plea agreement, from being admitted into evidence at trial if the plea is subsequently withdrawn. The purpose of these statutes is to promote frank and open negotiations between the defendant and the State by shielding defendants from inadvertent self-incrimination if the negotiations fail. Mundt v. State, 612 N.E.2d 566, 567-68 (Ind. Ct. App. 1993).

The trial court must grant a defendant's objection to the filing of an additional charge if the defendant can show that the decision to add the charge was motivated by a desire to punish the defendant for doing something he was legally allowed to do. Coates v. State, 534 N.E.2d 1087, 1090 (Ind. 1989). The defendant is not entitled to a presumption of vindictiveness if charges are added before trial. Reynolds v. State, 625 N.E.2d 1319, 1321 (Ind. Ct. App. 1993). Moreover, the filing of charges subsequent to a breakdown in plea

negotiations does not constitute retaliation for the defendant's exercise of his right to trial if the charges are supported by probable cause. Id. at 1322.

In this case, Plump's claim of ineffective assistance of counsel must fail because he cannot prove that the trial court would have granted his counsel's objection to the addition of the felony murder charge. Assuming that Plump's trial attorney had objected to the addition of the felony murder charge, Plump would not have been able to show any vindictiveness on the part of the State because the charge was supported by probable cause. Therefore, the court would have denied the objection. See Coates, 534 N.E.2d at 1090; Reynolds, 625 N.E.2d at 1322. The State maintains that it added the felony murder charge because it had evidence to support the higher charge, Plump's co-defendants had been charged with felony murder, and the State had intended to file the felony murder charge but had not because of the ongoing plea negotiations. Appellee's Br. p. 2. We find the State's reasons for filing the additional charge persuasive; therefore, we conclude that the trial court would not have sustained Plump's objection to the charge because the State's action was not motivated by vindictiveness. Thus, Plump did not suffer prejudice from his counsel's failure to object to the charge and his ineffective assistance of counsel claim fails. Strickland, 446 U.S. at 687.

Notwithstanding the above, Plump directs us to a statement made by the prosecutor to support his contention that the State impermissibly relied on the plea negotiations to file the additional charges. Appellant's Reply Br. p. 2. However, the post-conviction court found that "[t]he mention of the September 15, 1994 statement in relation to the filing of the additional charge of felony murder is inconsequential . . . . The [plea] statement was not

admitted in any way either at trial before the jury or at sentencing." Appellant's App. p. 160. We defer to the post-conviction court's finding that no evidence of Plump's plea negotiations was introduced at trial. Therefore, Plump's right not to have the plea negotiation used against him was not violated. See Kercheval, 274 U.S. at 220; Moulder, 154 Ind. App. at 257, 289 N.E.2d at 528. Plump also directs us to Bell v. State to support his argument that the trial court would have dismissed the felony murder charge if his counsel had objected. 622 N.E.2d 450 (Ind. 1993), overruled on other grounds by Jaramillo v. State, 823 N.E.2d 1187 (Ind. 2005). Plump's case can be distinguished from Bell because, unlike in Bell, no evidence of Plump's guilty plea was introduced at trial. See Appellant's App. p. 160. As a result, for all of these reasons, Plump's claim of ineffective assistance of trial counsel fails.

The judgment of the post-conviction court is affirmed.

VAIDIK, J., and CRONE, J., concur.